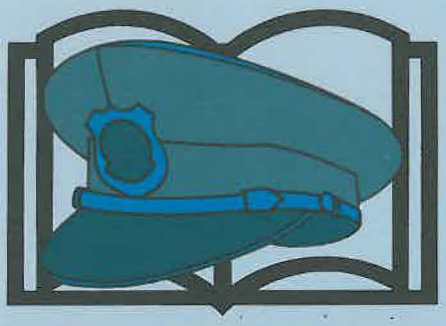

ISSUES OF INTEREST

VOLUME NO. 26

Justice Institute of British Columbia
POLICE ACADEMY
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ISSUES OF INTEREST

VOLUME NO. 26

Written by John M. Post

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Admissibility of Evidence and Statements

Regina v. Sowers, B.C. Court of Appeal -
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The accused was suspected of having robbed a bank-teller. Several months after the robbery the police had reasonable and probable grounds to obtain a warrant for the accused's apartment to search specifically for two handguns.

The accused was friendly and cooperative and at first denied any knowledge of the guns. The officers assured him they would find the weapons but gave the accused an opportunity to tell them where they were. If not, they reminded him, they would have "to tear the place apart" and that could cost the accused his damage deposit. Following this, the accused said: "One gun is in a suitcase and the other is in the bedroom".

Following this, the officers discussed the robbery with the accused:

> "A witness saw you come in the building and recognized you from the bank robbery" was the untrue statement by one of the officers. "You might as well get it over with and "fess up" was the follow-up suggestion. That the accused did by saying: "I guess I am the guy that did it". He also told how he used the guns from the crime to pay off some debts. About ten hours later the accused was asked to and did write out a complete confession.

During his trial for armed robbery no Charter arguments were raised as everything in terms of reasonableness and other rights of the accused had not been infringed. However, defence counsel argued that the statement telling police the location of the guns was hardly voluntary. "Tell us or we tear your place apart" was in essence the threat that preceded the statement. The confession in regards to the robbery was obtained by clear deception and trickery. These, submitted the defence, are hardly facts that can support a finding of voluntariness on the part of the accused. However, the statements were admitted in evidence and the accused appealed the conviction that followed.

The B.C. Court of Appeal could not substitute their opinions that lead to the finding of fact by the trial Judge in regard to the voluntariness of the statement. However, the Court of Appeal levied considerable criticism at the officers. The language used ("tearing the place apart") was inappropriate and would, if becoming a practice, constitute an adverse reflection on the administration of Justice. Said one Justice: "Had I been the trial Judge in this case I would have held a different view about the admissibility of this evidence than the trial Judge did".
The B.C. Court of Appeal said it was reluctant in dismissing the accused's appeal as they did "deplore the conduct of the police in this case and the trickery used by them.....".

Accused's appeal dismissed
Conviction upheld

Hit and Run Provisions in B.C. Motor Vehicle Act
Vagueness of Law

Regina v. Rowley, B.C. Court of Appeal
Vancouver Registry CA 005213, September 1986

The Crown proved that the accused drove a taxi and collided with the cyclist who fell on the back of the cab and then onto the road. The taxi never stopped and due to the cyclist taking the licence number the accused was found and identified as the driver. He was consequently convicted of "failing to remain at the scene of an incident". (s.62 (1) m.v.a.)

The accused successfully appealed the conviction to the County Court submitting that s.62 m.v.a. is unconstitutional in that it contravenes s.7 of the Charter of Rights and Freedoms. A principle of fundamental justice is that it has to be clear and specific and where it creates an offence, it must leave no doubts what behaviour it prohibits. To say that a person must remain on the scene of an incident in which he is involved on a highway is simply too vague and not a "reasonable limit" to the right provided for in s. 7 of the Charter.

The Crown appealed the County Court's reversal of the accused's conviction to the B.C. Court of Appeal.

In 1980 (pre Charter days) similar language in the then "hit and run" section of the Motor Vehicle Act was also challenged before the B.C. Court of Appeal.*

"Vagueness" was also then the argument and it was submitted that consequently the section created "no offence known to law". After all, what is an incident? It could be an angry verbal exchange with another motorist. In 1980, the Court of Appeal totally rejected the defence arguments and said that if common sense prevails the section is clear. It speaks of returning to the scene, exchange documents in respect to civil liability and rendering assistance to injured persons. What else does this describe but a collision; a simple accident. In this case, however, the Court had to apply the Charter provisions to the legislation to test it for constitutional clarity; "to consider the vagueness of the word 'incident' in its broadest literal meaning and not in the meaning already determined" (in the 1980 Soltys case). The Court adopted a U.S. "test of vagueness" which states that a law is vague when "it fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by statute".

The following sentences express the sentiments of the B.C. Court of Appeal in response to the defence arguments that the section was riddled with vagueness:

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* *R. v. Soltys*, 8 M.V.R. 59

The following sentences express the sentiments of the B.C. Court of Appeal in response to the defence arguments that the section was riddled with vagueness:

> "To the contrary, any reasonable person driving a motor vehicle would or should know that where an accident has occurred on a highway in which his car is directly or indirectly involved he must remain or return to the scene of that accident".....
> "....the impugned section neither fails to give fair notice nor encourages arbitrary and erratic exercise of police powers"....

The B.C. Court of Appeal agreed with a U.S. dictum that .... "One to whose conduct a statute clearly applies may not successfully challenge it for vagueness". Although the Court did not spell this out, it did subtly suggest that a person who knocks down a cyclist and has the victim roll over his vehicle and then claims the law that tells him to remain at the scene of an incident has such a vagueness about it that he was not sure it applied to him in such circumstances, is absurd.

Comment:

The above-mentioned principle that "one to whose conduct a statute clearly applies may not successfully challenge it for vagueness" is not one created in this case by the B.C. Court of Appeal. It was adopted from U.S. jurisprudence.*

What this in essence means, is that vagueness of law a person is accused of having offended, is only a valid constitutional issue if that law is vague considering the events and circumstances in which the accused person was involved. In other words, there is nothing vague about law where events and circumstances would have conveyed to any reasonable person that it applied to him in those circumstances. This means that there may be incidents of "hit and run" of less flagrant and conspicuous circumstances in which s. 62 (1) M.V.A. is wanting for vagueness.

An accused person can challenge the validity of law in respect to the jurisdictional competence (vires) of the government that enacted it; or on account of excessive "breadth" (overbreadth) in that it is too much of a catch-all in regard to constitutionally protected conduct; being discriminatory; inconsistent with the Charter of Rights and Freedoms; etc.

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* *Parker v. Levy*, U.S. 733, 756, 41 L. Ed. 2d. 439 [1974]

The Courts are, if the challenge is successful, empowered to declare such law without force or effect. It seems that "vagueness" is no cause for such a declaration but is a constitutional defence if the law is too vague to clearly capture the accused's alleged culpable behaviour.

* * * * * *

Search Upon Suspicion - Reasonableness - Exclusionary Rule

Regina v. Glowa, B.C. Court of Appeal -
Vancouver Registry CA 004425, March 1986

Police found a pick-up truck parked around midnight, in a district frequented by prostitutes, many of whom were active drug abusers. Checking the licence number they found the owner (the accused) was on parole for armed robbery and upon checking the truck they found the accused behind the wheel and his passenger to be a person who was awaiting trial for possession of narcotics. The officers searched the truck and found a knife on the seat next to the accused. The knife was one that opens automatically by pressing a button attached to the handle. Consequently, the accused was convicted of possessing a prohibited weapon. (s. 88(1) C.C.)

The trial judge had found that the search of the truck was "unreasonable" and had infringed the accused's right under s.8 of the Charter. Yet she had allowed the knife as an exhibit in evidence. The accused argued that the evidence should have been excluded under s. 24(2) of the Charter.

The reason why the trial Judge had found the search to be unreasonable was that they had acted on a 'hunch', but no reasonable grounds for believing that drugs were kept in the vehicle. Therefore, the search was unlawful, she had reasoned. However, both the trial Judge and subsequently on appeal, a County Court Judge found that admission of the knife in evidence would not bring the administration of justice into disrepute. The accused then took his plight to the B.C. Court of Appeal.

That Court reasoned that considering all of the circumstances, including the area in which they were parked, the accused and his companion could not have had any real expectation of privacy. The officers had not acted capriciously, carelessly, or out of malice. They acted reasonably. The Court concluded that admission of the evidence did not bring the administration of justice into disrepute. It even had serious doubts if the search and seizure had, in fact, though unlawful been unreasonable and hence contrary to s.8 of the Charter.

Said one Justice:

> "....I cannot accept the ruling that the search and seizure infringed the appellant's Charter right under s.8. To acquit a man known to be a long term parolee from a prison term imposed for armed robbery for want of evidence of possession of a prohibited weapon because the search and seizure was made in suspicious circumstances on a general rather than a specific suspicion would, to my mind, bring the administration of Justice into disrepute".

Admission of the evidence simply would not endanger the public's confidence in the integrity of the judicial process.

Accused's appeal dismissed
Conviction for possession of a prohibited weapon upheld

Comment:

Considering the well known views of the B.C. Court of Appeal on the exclusionary rule (in essence the application of s. 24(2) of the Charter) this case was quite predictable in terms of content. However, hovering over this Court's reasoning is the Supreme Court of Canada decision in the Therens* case. Defence counsel used that Court's language in submitting that the search was unreasonable and that automatically a flagrant infringement of the accused's right occurred. In other words, he submitted there was a strict exclusionary rule or at least, that all infringements of a right or freedom by means of which evidence was obtained, would shake the public's confidence in the integrity of the judicial process if it allows such evidence to be admitted.

There is a tremendous gap between the defence's interpretation of the Therens decision and the application of s. 24(2) of the Charter and that of the B.C. Court of Appeal which has maintained its original views** on these issues.

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* See Volume 21, page 1 of this publication

** See Volume 22, page 20, *Regina v Rodenbush and Rodenbush*, and *Regina v Gladstone*

How much of a Drug or Narcotic must a Person Possess before he commit an Offence?

Regina v. Brett, B.C. Court of Appeal
CA 004498 - Vancouver Registry

Police found a cigarette filter on the accused which was later discovered to contain Talwin. Needless to say, the officers did not know that the filter (which was found in a pill vial) contained Talwin, but they suspected as much and asked the accused who readily admitted it. He said he "cranked" about an hour ago. The County Court Judge who heard the accused's appeal, did set aside the conviction of "possession" and substituted an acquittal. The Crown appealed that decision to the B.C. Court of Appeal.

In the early seventies there were judicial precedents that a person ought not to stand convicted for the possession of traces of illicit narcotics or drugs unless it could be shown it was the remnant of a larger quantity. In respect to the quantity it was to be a "usable" one. Anything less, though it is not the "equivalent of nothing", does not offend what parliament tries to control. In England the Courts ruled similarly and the principle seemed, in Canada, to become the accepted test to determine if there was sufficient of the illicit substance to determine if either the Narcotics Control Act or the Food and Drug Act had been offended.

However, in 1982 the British House of Lords had the following to say about the test:

> ".....I have concluded that the 'usability' test is incorrect law. The question is not 'usability' but possession".

The B.C. Court of Appeal agreed with that statement and held that the County Court Judge had erred in law when he ruled that the Crown had to show that the accused possessed a usable quantity of Talwin. Furthermore, the Crown had shown that the traces of Talwin were the remnants of a usable quantity. The admissible statement by the accused proved that and all the essential ingredients of possession such as control and knowledge.

The Court warned that:

> ".....the importance and determination factor in this case is the respondent (the accused) admitted that he was in possession of a prohibited drug. What the outcome would be if no such admission had been made will have to be determined in a future case".

In other words, the Court warned (though they did indicate their views on the usable quantity test) that this case may not serve as a precedent. Afterall, the Crown did show possession, control, and knowledge in relation to an illicit substance, the remnant of a quantity sufficient to "crank" an hour ago.

Crown appeal allowed

Note: There are quite a number of cases in respect to possession of traces of drugs or narcotics which resulted in acquittals. However, in most of these cases, the issue of 'knowledge' caused the problems for the Crown, and not the quantity.

* * * * * *

Is Climbing a Fence which totally encloses a Yard Breaking and Entering?

Regina v. Fajtl, B.C. Court of Appeal - CA 004874 Vancouver Registry, September 1986

Police had found the accused inside a scrap yard which was totally enclosed by a 10 ft. high fence topped with barbed wire. There was also a building within this enclosure. The accused had climbed the fence and allegedly had sacks containing brass ready to be taken out. Consequently, the accused was convicted of breaking and entering with intent to commit an indictable offence. He appealed the conviction arguing that the enclosure was not a "structure" (s. 306(4) (b) C.C.) and that climbing the fence does not amount to "breaking and entering" as entry was not gained through "a permanent or temporary opening". (s. 308 (b) (ii) C.C.).

Surreptitious entries of locked up and completely enclosed commercial "yards" have resulted in breaking and entering convictions before. In 1964, the Supreme Court of Canada* dealing with the breaking and entering of a mobile bunkhouse, discussed the meaning of "structure". Said the Supreme Court of Canada:

> "In all cases we must be guided by what I may call the intentions of the structure, and must enquire with what intention it was made".

This has resulted in several provincial superior Courts finding that such fenced enclosures are structures. In relation to a fenced structure, the Court held that it must be substantial in size, built up from component parts and intended to remain permanently on a permanent foundation. Even if some parts are moveable, it will still be a "structure" The B.C. Court of Appeal agreed with its Nova Scotia counterpart which was of the opinion that an enclosed and permanently fenced commercial "yard" was included in the Supreme Court of Canada's definition of structure**. In that case, the accused also gained access by climbing such a fence which the Court concluded was gaining access through a permanent or temporary opening. The B.C. Court of Appeal also agreed with that conclusion.

Accused Appeal dismissed
Conviction of Breaking and Entering upheld

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* *Springman v. The Queen*, [1964] 3 C.C.C. 105

** *R. v. Thiebault*, [1982] 66 C.C.C. (2d) 422

Note: The accused had heavily relied on a case decided by the B.C. Court of Appeal in 1966* where it quashed a conviction of Breaking and entering as a garage "with one open end" (assumed to be some sort of car-port) was not a "permanent or temporary opening" within the meaning of the criminal code. The B.C. Court of Appeal did not say that the Sutherland decision had not survived the subsequent Supreme Court of Canada's version of "structure" but conceded that it had been "severely circumscribed".

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* *R. v. Sutherland*, [1966] 58 WWR 441

Theft and Mischief to Prevent the Crime of Abortion

Regina v. Demers, B.C. Court of Appeal, CA 04852 - Vancouver Registry, September, 1986

The accused, a man who strongly believed that the abortion proceedings at the local hospital were illegal, in that doctors performed the surgery without a "valid" requisite certificate from the "medical therapeutic committee", made his way into an operating theatre and stole an aspirator. He took it home, damaged the equipment so it was inoperable, delivered it back to the hospital and phoned the police. He was consequently convicted by a jury of theft, possession of stolen property and mischief. The accused appealed the convictions.

Firstly, the accused had not been allowed to lead evidence that the certificates the doctors had when performing abortions were invalid as they were not issued, upon the committee being satisfied that continuation of the pregnancy would likely endanger the life or health of the mother.

Secondly, the accused argued (as what was taking place in the hospital amounted to an offence under section 251 C.C.) he was by virtue of s.27 C.C. authorized to use as much force as was reasonably necessary to prevent the commission of an offence.

Both grounds for appeal were found to be without merit. At the time the accused removed the equipment there was no abortion being performed or about to take place. The defence the accused raised is dependent upon actions necessary to prevent immediate situations. Therefore, it would be superfluous to adduce evidence in respect to the validity of the certificates as s.27 C.C. was not intended to apply in the circumstances as they were when the accused committed the offences.

Comment:

What is somewhat surprising is that no issue was taken with the multiple convictions for theft and possession of the goods stolen. Ever since the offence of "receiving" property obtained by means of an indictable offence was changed to "possession" of property so obtained, the latter seems an included offence to theft because it is "an act of necessity". Considering the definition of possession in s. 3(4) C.C., it seems impossible to commit theft without possessing the stolen goods. Possession of stolen goods appears to be as included in theft as theft is in robbery. Section 589 C.C, the section that provides for the divisability of indictments and thereby creates the principle of included offenses, does not provide for an offence to be included in another offence due to the former being an act of necessity to commit the latter. This has been argued upon pleas of double jeopardy (autrefois acquit autrefois convict, meaning: "I have been

acquitted or convicted of this very charge or of one connected with it by means of the concept of included offenses, arising from the same incident"). There are many examples of this in case law. Even if one wanted to argue that section 589 C.C. is exhaustive (no offence is included in another offence other than provided by that section or other specific provision), one would think that the principle established by the Supreme Court of Canada* in 1974 would apply. It provides that a person must not be convicted of more than one offence arising from one delict. This principle deals with those offences not included but which overlap with one another. At least, theft and possession seem to do that.

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* *Kienapple v. The Queen*, [1975] S.C.R. 729 -
The principle is discussed in Volume 22 in *Regina v. Krug*, on page 2

Consent to Assault - Can a person License another to Commit a Crime of which he will be the victim?

Regina v. GUR, 27 C.C.C. (3d) 511
Nova Scotia Supreme Court - Appeal Division

The accused was put on notice by his girlfriend that all relations between them were terminated. He did not take this lightly and one night, after having been drinking, he went to the girl's home, and gained entry to her bedroom and bed. A Mr. Rafuse who lived in the basement of the house arrived home in the early morning hours and noticed the accused's truck parked in front. He went to his quarters but became increasingly concerned about the safety of the girl. He was aware of the violent tendencies of the accused and he decided to check on the girl. He first phoned police and then went upstairs taking a draw knife with him. He left the knife on the main floor before going to the top floor where he made his inquiries from the hallway. The answer he received from the girl did not allay his fears for her and he made further verbal inquiries. This infuriated the accused who came out of the bedroom, completely naked, brandishing a knife. He chased Mr. Rafuse down the stairs and then returned to the girl's bedroom where he dressed himself while pledging that he was going to kill Rafuse. The two men were stabbing at each other when police arrived. Both required medical attention for minor wounds to arms and hands. As a result of this encounter, the accused was convicted of "possession of a weapon for the purpose of committing an offence" (s.85 Criminal Code). The offence, of course, was assault on Mr. Rafuse. However, the accused contended that there was no assault. In appealing his conviction the accused maintained that Mr. Rafuse participated willingly in a fight and, therefore, whatever the accused did to him, was done with consent. The defence claimed that Mr. Rafuse wanted to fight and in the circumstances, the burden of proof was on the Crown to show that he did not consent.

The Appeal Division of the Nova Scotia Supreme Court held that consent played no part in the Crown's case at all. Although the definition of assault in the Criminal Code does say that assault is a touching without the consent of the person touched, assault with a weapon or of a kind where there is a degree of violence that bodily harm is a probable consequence, the crime is of such gravity that no person, including the victim, can license anyone to commit that crime. The way that the accused aggressively pursued Mr. Rafuse with a knife in retaliation for what he (the accused) considered an intrusion, amounted to assault whether or not Mr. Rafuse consented to the contest. Where a person may, in law, be able to consent to a fair fight, he cannot consent to have bodily harm inflicted upon him.

Accused's Appeal Dismissed

Comment:

Despite the abundance of text on this issue of consent it cannot be said that the law is clearly established. The instructions to the jury by the trial judge, in this case, was a prime example of this, as are decisions by other Courts of Appeal. This synopsis does not include the details of these different views. It does, however, reflect what can be considered the common denominators of the common law surrounding this issue. Particularly, assaults committed in sports are very difficult in regards to consent, such as implied consent when participating in a contest. Prize fighting cases and debates about this so-called sport where the objective of the participants is to render the brain (the most puzzling and miraculous organ, which when dead, is at common law the equivalent to physical death) of his opponent temporarily non-functional. The question remains whether a prize fighter in law, is able to license (by consent) his opponent to inflict that harm to him. At the risk of exposing my personal bias, I predict that due to the incredible economic gains to those who exploit young athletic men, the issue of legality and moral propriety is not likely to be challenged.

* * * * *

Non-disclosure of Confidential Information Claimed To be Needed by the Defence for a fair Trial - Public Interest and Private Interest

Regina v. Kevork, Balian and Gharakhanian - 27 C.C.C.(3d) 523
Ontario High Court of Justice

The accused were charged with the attempted murder of a foreign diplomat and conspiracy to murder that diplomat. During the preliminary hearing defense counsel asked police investigators questions that would have revealed information the Canadian Security and Intelligence Service considered confidential and a representative of that service objected to the questions to be answered. The accused took their request for the information they claimed to be essential to make a full answer and defence to the allegations, to the Federal Court.* As the information was to be used only to discredit a Crown witness and not to counter any of the elements of the alleged offenses; and as the information they applied to have disclosed was possibly helpful in their defence; and as it was to be used not at a trial but a preliminary hearing which could at worst result in a committal, the State interest in national security did supersede the interest of the accused.

When the accused were tried for the alleged offenses the very same issue arose and the accused reasoned that the Crown, their accuser, had information essential for them to make a full defence and it refused to make that information available. Having an opportunity to prepare a full defence is included in the "principles of fundamental justice" which must be observed in any process that may result in deprivation of liberty or security of the person. (s.7 Charter of Rights and Freedoms). The accused, therefore, petitioned the Ontario High Court of Justice, to order the Crown to provide them with the information or order a judicial stay of proceedings as a remedy to this infringement of their constitutional right.

Included in the reasons for objecting to supply the information was the protection of 'operatives'; revealing methods of operations; the identity of targets and technical resources. The C.S.I.S. did not consider the information required of any significant value to the defence and thought the defence posturing to be nothing more than a fishing expedition on the part of the foreign political group the accused belonged to. The information would be invaluable to their operations in Canada.

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* See the recently enacted 36.1 Canada Evidence Act - re: *Kevork and The Queen*, 17 C.C.C. (3d) 426

The whole issue was that Crown witnesses' (police officers) testimony caused the defence to infer (the Court considered it a reasonable inference) that there had been electronic and physical surveillance. The testimony of co-conspirators was damaging to the defence, but was riddled with inconsistencies. The defence claimed that if it had access to this confidential information it could totally discredit those witnesses. The Crown would not concede to the defence inference or that C.S.I.S. would not open any part of its books. The Federal Court is now in charge of determining disclosure of information concerning international relations, national security or defence and determines any application for disclosure strictly by considering the competing interests of the applicants and the State. It is pretty well accepted in law, that public interest in these areas supersedes that of an individual. The Federal Court's involvement in this case was not part of the criminal process and whether the accused (applicants) could have a fair and impartial trial or had their rights infringed was not for the Federal Court to consider. That responsibility befalls the trial Court which is "a Court of competent jurisdiction" under s. 24(1) of the Charter to remedy any infringement of a Charter right or freedom. The accused did apply for such a remedy and suggested a stay of proceedings. The Crown simply could not have it both ways. The success in the Federal Court procedures to suppress information came to hound it in the criminal process. The objectives of the two processes and the responsibility of the respective judiciary were simply distinct from one another, despite the fact that the same applicants and activities were involved.

The Ontario High Court of Justice was unable to order disclosure of information the Federal Court had ruled could not be disclosed. On the one hand the Court could not allow an accused person to be sacrificed "at the alter of national security", and on the other hand the State is in no position not to prosecute because it is in possession of some information it will not, for good reason, divulge.

The question to be decided by a trial Court finding itself in the middle of such a conflict of public interest vs. private interest, is whether or not a fair trial (an accused's constitutional right) can be had. That is a decision the Federal Court did not have to make. It simply had to determine if the information requested could, considering national security, be released.

The defence suggested the application of "the stock choice rule". That means to hold that the State must desist from prosecution unless it is prepared to make all information available to the defence. Another suggestion was to impose a conditional judicial stay of proceedings, the condition being that the Crown gives the accused the information he needs for his defence if it wants the trial to continue. A third, was to order the Crown to make the information available to the defence. If this was not palatable to the Crown, it, of course, can order a stay of proceedings to be entered on the record.

The Court disagreed with the suggestions and the ancillary submissions. All three are in essence the same in character and consequences.

The Court held that no stay of proceedings is justified as a constitutional remedy under s. 24(1) of the Charter in circumstances as these unless the evidence (information) is critical or essential to the defence. To avoid "fishing expeditions" the Court held further that the burden is on the accused to show that the evidence the information would reveal is critical or essential. Only when it is able to show that can a remedial stay of proceedings be considered. This is consistent with the law in relation to police informers. Only where the defence can show that the identity of the informer enables it to demonstrate innocence, may a Court order that the informer's name be revealed.

The defence in this case had failed to show that the information it wanted was either crucial or essential to the defence.

Application for a order to make the confidential information available to the accused or stay proceedings was denied.

Warrantless Video Monitoring of a Public Washroom To Gather Evidence of Gross Indecency - Unreasonable Search and Seizure

Regina v. Lofthouse, 27 C.C.C. (3d) 553
District Court of Ontario

Complaints of suspicious goings-on in a shopping mall and particularly in the public washroom of a nearby public park, caused police surveillance and officers secreting themselves in a closet off that men's washroom. They observed the accosting of young boys by a number of men and heard sounds from the bathroom's cubicles consistent with homosexual acts taking place while some of the suspicious men seem to be the look-outs. Police received permission from the City Parks department to install video equipment in the washroom's vents to monitor the activities in the cubicles and at the urinals. Needless to say, many an unsuspecting citizen was caught in the two day monitoring operation with "his pants down" or gave evidence of his kidney function. However, the officer manning the equipment was very selective what he taped. He testified that only apparent criminal acts were secured and 18 persons, besides the accused, were convicted of various sex offences as a result.

The accused had entered the washroom one minute after his sex partner did. Two men, also under surveillance because of suspicious activities, manned the entrance door while the accused and his partner committed an act of gross indecency in one of the washroom cubicles. All of the eight minute affair was caught on candid camera and was, of course, sought to be accepted by the Court as evidence of the allegation of gross indecency.

The accused opposed the admissibility of the video tape. He claimed that when a person closes the door of a washroom cubicle behind him, then he is entitled to privacy. The camera, with the policeman on the other side of the lens, was an act of "search and seizure" he claimed. To render such a search reasonable the police should at least have a warrant issued by the impartial judiciary he said. The accused, relied heavily on U.S. cases but no less on the decision by the Supreme Court of Canada in October 1984* when it said that judicial search warrants were no longer to protect property and license trespass, but to protect the privacy of individuals and said in the same breath that any warrantless search is ipso facto unreasonable. This left this Ontario District Court Judge to decide if the video monitoring and capturing the accused in a compromising position was "search and seizure", and if so, was that search and seizure reasonable.

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* *Hunter v. Southam Inc., Volume 18, page 12 - 14 C.C.C. (3d) 97*

There has been a legal inclination to define search as rummaging; looking for something deliberately concealed or made inconspicuous in some way. The "something" was envisioned to be contraband, something tangible, something one can touch and has weight. What could only be seen, smelled or heard was not considered to be something we can, in law, "search" for or, for that matter "seize".

However, since our entrenched Constitution act has come into effect its application has made quantum changes to the interpretation of matters like these. As explained above, our judicial licences to search are no longer an authorization to trespass and protect property but a means to protect the privacy of citizens. Interception of a private communication is a search and seizure and it is predicted that visual searches will receive the same recognition. Section 8 of the Charter, said the Supreme Court of Canada, is dealing

> "with one aspect of what has been referred to as a right of privacy which is the right to be secure against encroachments upon the citizens' reasonable expectation of privacy in a fair and democratic society".

The District Court Judge concluded from all this that the video monitoring and taping was a "search and seizure" section 8 of the Charter refers to. Furthermore, the Court found that a washroom cubicle is a place where one is entitled to a reasonable expectation of privacy. As surely as we have similar places in our homes which we consider very private when in use, so much more is it private when we use a public washroom. Quoting from reasons for judgement by the U.S. Supreme Court* where it dealt with the interception (a search and seizure) of communications in a public phone booth, the Ontario District Court Judge said:

> "The point is not that the booth is accessible to the public at other times, but that it is a temporary private place whose momentary occupants' expectations of freedom from intrusion are recognized as reasonable".

The Judge applied this reasoning to the public washroom cubicle.

Having found that the police had searched a place of privacy and had seized images of the accused's activities, it had to be determined if that search and seizure were reasonable.

The Supreme Court of Canada held in 1984 that s. 8 of the Charter is there to prevent unjustified intrusions, and not just a means to determine afterwards whether or not a search should have taken place. A search

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* *Katz v. United States*, [1967] 389 U.S. 347

warrant is prior authorization and any search and seizure without such authorization must, by its very nature, presumed to be unreasonable. This means that the admissibility of evidence resulting from a warrantless search has proof of constitutional reasonableness as a prerequisite. The burden of that proof is on the Crown. In other words, where the absence of a warrant compels a presumption of unreasonableness, the Crown must rebut that presumption. Afterall, it is recognized that it is not always possible to obtain a warrant either for practical reasons or because the circumstances are not befitting the statutory provisions to obtain a search warrant. The Judge pondered that in this case, because of the accused's activities, there is judicial scrutiny of the search and seizure practice of police.

But what about the infringements of the privacy of all the citizens who during this search used the washroom for purposes for which it was invented by the English Mr. Crapper.

The Court, very cognizant of the fact that a warrantless search is only presumed to be unreasonable until proven otherwise, held that in this case the search and seizure had been unreasonable, and that the accused was entitled to consideration for the exclusion of the evidence obtained by that search "and to have the truth suppressed".

For this, the Court followed the B.C. case of *Regina v. Collins** and held that admissibility hinged on circumstances and whether it would bring the administration of justice into disrepute.

The police had acted quite prudently held the Court. They had attempted every conceivable other means to gather the evidence and defence counsel's suggestion that undercover personnel should have been used or notices posted warning of the washrooms being monitored, were soundly rejected. Police were confronted with reasonable and probably grounds for believing that gross indecency was committed in a public park frequented by children and teenagers who played in various teams on the park's sport fields or frequented the nearby mall. Police authorities and management believed there was no provision for a search warrant in the circumstances and did issue strict policies on how the monitoring was to be done and restricted the period of monitoring to a maximum of three days (only two were used). Said the Court:

> "That the search failed to meet the constitutional standard of reasonableness required by s. 8 (of the Charter) was not the fault of the police so much as the lack of either a legislative scheme of authorizations similar to the wiretap provisions of the Criminal Code or a clearly enunciated, judicially imposed standard".

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* *R. v. Collins*, [1983] 5 C.C.C. (3d) and Volume 12, page 1 of this publication

Despite the highly sensitive intrusive unreasonable search by police, they had acted in good faith and with caution and prudence. Therefore, the administration of justice would not be brought into disrepute if the video tape in question was admitted in evidence.

Application for exclusion of evidence dismissed.

Comment:

Since this investigation, section 443 C.C., which had been thought inadequate for a Justice to issue a search warrant, in these circumstances, has been amended. Possibly, the new subsection (b) to section 443. C.C. may suffice for the purpose. It reads:

> "A Justice who is satisfied by information upon oath in Form 1, that there is reasonable ground to believe that there is in a building, receptacle or place anything that there is reasonable ground to believe will afford evidence with respect to the commission of an offence against this Act or any other Act of Parliament....may at any time issue a warrant....authorizing a peace officer to search the building or place...."

The draftsman of this inserted subsection could possibly have made a greater effort to have it blend and harmonize a little better with the rest of the section, but it seems likely that a Justice might have issued a warrant had that subsection been in effect when this investigation took place.

Without the new subsection, s. 443 C.C. did not likely provide for a warrant in the circumstances of this case. It refers to anything related to an offence that has been or is suspected to have been committed. In terms of the offence, the old section was designed to deal with it after the fact to discover proceeds of it or evidence in relation to it, while the new subsection deals with anything yet to be used to commit an offence. It seems neutral in terms of the point in time in relation to the commission of the offence. It says that when a Justice can be satisfied by means of a sworn information, that there is reasonable ground in respect to location and reasonable ground that at that location evidence can be obtained in respect to the past, present or future commission of an offence, a search warrant for that location (building, receptacle or place) may issue.

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Search Warrant Issued for Period of Eight Days To Accommodate Search and the Arrest of a Wanted Person

Regina v. Coull and Dawe, B.C. Court of Appeal - Victoria V000285, December 1986

Police had grounds to believe that a Mr. Blackfoot was cultivating marijuana at the house of his girlfriend. They were granted a search warrant and were anxious to execute the search warrant when both were home. As that was rarely the case, it caused at least one such warrant not to be used. Besides discovering evidence of cultivation police were interested in arresting Blackfoot for another matter.

Police were accommodated in this by a Justice of the Peace who did issue a search warrant valid for a period of eight days. Police simply waited until both parties were home and then executed the warrant. When the evidence of cultivation was brought before the trial Judge, he held that the Justice of the Peace had exceeded his jurisdiction and the warrant was consequently quashed and the search, in the circumstances, had been unreasonable. (s.8 of the Charter of Rights and Freedoms). The evidence was, as a result, held to be inadmissible. The Crown appealed this decision.

The B.C. Court of Appeal had difficulty in finding the basis for the trial Judge's views and conclusions. Referring to U.S. precedents the Court found:

> "..... it has repeatedly been held that delaying the execution of a search warrant for the purpose of apprehending the subject is entirely legitimate".

It concluded that in many cases not waiting for the suspect to be present is an invitation for him to flee; furthermore, defence will argue that a search in absence of the suspect is to his disadvantage. The latter issue is sometimes argued with such force that one would believe that it was a constitutional right for him to be present where this was at all reasonable and possible.

The B.C. Court of Appeal reasoned that if it is reasonable to delay the execution of a search warrant to facilitate the apprehension of the suspect, then it is also reasonable for the Judiciary to extend "the period of currency" of such a warrant for the same purpose. An eight day currency in the circumstances of this case (the known irregularity of the comings and goings of the suspect) was not unreasonable held the Court of Appeal. Afterall, it only authorizes one only search and hence the argument that an extended period of currency exposes the home-owner to an unreasonable risk of intrusion, is hollow from a constitutional standpoint. Although the

Justice of the Peace had been generous in the circumstances, he did not lack jurisdiction and was not excessive in making the warrant valid for an eight day period.

Crown's Appeal was allowed
Search warrant was restored

Assault - Consent - Self Defence - Intent

Regina v. QUIDING, County Court of Westminster,
No. XO 15790, May 1986

A girl had a "by invitation only" party. The accused, with some friends, crashed it. The girl's mother escorted the accused and his buddies out and was, in reciprocity, subjected to obscenities. The mother was worried about the crashers and asked her brother-in-law to come over. Indeed, the accused came back with a larger group this time. Again, the mother explicitly ordered them to leave and in response the accused shook a beer bottle and sprayed the mother.

The brother-in-law shoved the accused in the direction of the street to hasten his exit. The group, wanting to trespass, started to throw snowballs at the windows. The brother-in-law and "a helper" went outside and approached the group of "young persons" who, apparently, persistently sought access to the party. The "helper" approached the accused to speak to him, but was hit in the face with a beer bottle with such force that the bottle shattered and lacerated his face severely. It was conceded that the blow was in response to a "push" by the "helper".

Firstly, the Court found that the injuries sustained by the blow with the beer bottle amounted to bodily harm as defined in s. 245.1(2) C.C.

The accused had also suggested that, due to "the push", the encounter amounted to a fight. In other words, it was an event to which both parties consented. Hence, the blow delivered by means of the bottle was consented to and did not amount to an assault. In the alternative, "the push" was an assault that one reasonably could expect to escalate. Therefore, the "bottle-blow" amounted to self defence. The Crown countered that even <u>if</u> the victim invited a fight by his actions and words, then the reaction by the accused took matters completely outside the scope of consent, and there was no justification for self defence, considering the circumstances. The Court reasoned that there was already an intent to outrightly assault the victim and the "push" was as good an opportunity to carry out that intent as any. The accused's evidence, which told of aggressive and excessive force on the part of his victim which had jeopardized him in terms of his personal safety, was rejected and disbelieved. The accused's claim that the blow was one of: "I hit him before he would hit me" caused the Court to conclude that the accused has the requisite "intent" and he was convicted of assault causing bodily harm.

There was also an allegation that the accused was in possession of a weapon dangerous to the public peace, to wit, the beer bottle. The accused counteracted the allegation by saying he had the bottle in his possession for the purpose for which it was designed. The use of it in the assault was impulsive and unpremeditated. In other words, here was the accused in

possession of a perfectly legitimate object one moment and the next he used it as a weapon in a reflex. How could he possibly have formed the required intent to convert the bottle into a weapon?

Defence counsel referred the Court to precedents established by the B.C. Court of Appeal* the relevant and significant portion of which establishes that:

> "When he has possession of the weapon lawfully, I do not think an unpremeditated use of the weapon out of sudden anger or annoyance for the forbidden purpose is enough to convert a lawful possession....into an unlawful one.... The formation of the unlawful purpose....must precede its use.... The interval of time between the formation of the purpose and the use of the weapon need not be long. It may be in some cases very short but the gap must be significant."

In this case, the evidence showed that there was such a gap, after the victim had pushed the accused. The judgement described the accused's physical reaction prior to delivering the blow. It was akin to the maneuver often used by the macho character in a movie. To have the advantage of the element of surprise and maximization of the impact of the blow, the assailant will make at least a ninety degree turn as to make his intended victim believe that he is going to walk away from the scene, only to suddenly turn back and deliver the blow when the victim has his guard down and is commencing to show all the delights of a victor. (This comparison is mine and not the Courts).

That moment of turning was a gap in time, sufficient to infer that the accused had formed the necessary intent that converted the bottle into a weapon.

Accused convicted of assault causing bodily harm and possession of a weapon dangerous to the public peace.

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* *Regina v. Chalifour*, 14 C.C.C. (2d) 526. Also *R.V. Flack*.

Dangerous Driving and Impaired Driving Charges Arising from One Act of Driving

STALINSKI and The Queen, The County Court of Kootenay, Nelson Registry CC180/1985, May 1986

The accused did some fancy driving and spinning on a public street and, in the process, collided with a parked but occupied car. The accused and the person in the parked car knew each other and a conversation took place. The accused tried to persuade the other person not to call police. He conceded to be drunk and said he could not afford an impaired charge. He did more than imply that if police were called he would and could outrun them. As his pleas were of no avail, the accused squealed away. Police called at his home the next day and the usual after effects of inebriation were quite evident. As to an explanation of the collision, the accused said: "I booted it and it got away on me. I have been so good for so long, and then I just flipped out." In his testimony the accused owned up to having drunk 3 ounces of gin during that day (how much was before the accident is not related), and blamed the accident on a mechanical failure in that the throttle did stick. Based on the information supplied by the occupant of the parked car (a medical doctor) and the eyewitness' version of the accused's driving, charges of dangerous and impaired driving were preferred. Needless to say, that the sufficiency of the evidence and the propriety of two charges arising from one act of driving were the kernel of the defence strategy. At the trial level, these arguments were to no avail, but the accused appealed the multiple convictions that resulted.

The County Court Judge, who heard the appeal, held that the doctor's observations of the accused at the scene, the accused's volunteered opinion as to his own condition at the time of the accident and the symptoms the police officer observed the following day were sufficient to support the conviction of impaired driving.

In regards to the "dangerous driving" conviction defence counsel submitted that the evidence leading to the conviction of dangerous driving (the manner of driving) was part and partial of the evidence that proved the impairment while driving. In other words, the matter of the criminal intent (the guilty mind) was the same for both charges.

The County Court Judge did not accept the argument. The accused clearly intended and knew he was driving while "drunk." That showed the intent necessary for impaired driving. The intent to drive dangerously was distinct and supported by his manner of driving that resulted from "booting it." The facts were such that the conviction of dangerous driving did not establish everything necessary to convict for impaired driving. Hence the doctrine (res judicate) defense counsel raised was not available.

Accused's appeal dismissed
Both convictions upheld

Propriety of Multiple Convictions Arising from one Delict

Overlapping Offences

The Queen v. Prince, Supreme Court of Canada - November 1986

The accused, Sandra Prince, stabbed a pregnant woman in the abdomen. The victim was 6 months pregnant. The injuries sustained caused the premature birth of a baby boy who lived for only 19 minutes. The accused was charged with the attempted murder of the mother and manslaughter in regard to the baby.

She was convicted of causing bodily harm to the mother. The manslaughter charge, in relation to the "unnamed male child", became subject to an argument about the propriety of multiple convictions in respect to one single act of causing bodily harm.

In 1975 the Supreme Court of Canada dealt with an appeal by a party by the name if Kienapple* who was convicted of raping a 13 year old female person who was not his wife. In addition he was charged with having carnal knowledge of a female person under the age of 14 years (statutory rape). Despite the fact that neither offence is included in the other, the Supreme Court of Canada held that the two offences overlapped to such an extent that it would be wrong to convict Kienapple of both. Afterall, when all the essential ingredients of rape (as the crime then was) were proved there was only the age of the victim to be proved for the statutory rape. The two crimes had "male person, having sexual intercourse with a female person not his wife" in common. In carnal knowledge of the under 14 years old girl, consent is of no consequence. The Supreme Court of Canada then set the precedent that is now known as the Kienapple principle, that there are not to be multiple convictions arising from one "cause, matter or delict." (Note that the Court did not include 'offence'). Eversince this decision, the Kienapple doctrine has been one that caused considerable debate and inconsistent applications. To put it bluntly, the criminal justice community has been all over the place on this one, until in October of 1985** the Supreme Court of Canada seemed to modify its views of multiple convictions arising from one incident or act. It reiterated that where

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* *Kienapple v. The Queen*, [1975] 1 S.C.R. 729. Explained in Volume 22, Page 2

** *Regina v. Krug* - See Volume 22, page 2 of this publication.

parliament had clearly indicated in its enactments that a person must answer for more than one allegation arising from one act of wrongdoing, multiple convictions are appropriate. Furthermore, the Court seemed merely to return to the reasoning prior to Kienapple, in respect to multiple convictions.

It seems fair to say that the Kienapple decision was designed to create a zone between the rigid double jeopardy rule and where, in law, offences are clearly separate and distinct from one another. Multiple convictions were occurring where that seemed excessive and unjustified.

Defence counsel made a preliminary motion when the trial started, that the proceeding be stayed on the basis of the Kienapple principle. The trial Judge denied the motion and had reasoned that where there is a single wrongful act involved, there can only be one conviction except in "multi-victim situations". This case ended up in the Manitoba Court of Appeal which unanimously decided that, due to the Kienapple principle, the accused could not be convicted of manslaughter. Accordingly, the indictment was quashed. The Crown appealed this decision to the Supreme Court of Canada.

It seems fair to say that the Supreme Court of Canada conceded that the Kienapple principle had gone in too many different directions and a clarification was overdue. The Court was clear in saying that the "one act test" is not correct. There are many situations where persons have committed one act and are thereby involved in more than one delict. The following are some examples:

1. Mr. Cote committed a robbery. He served a sentence in gaol and was, two years later, found in possession of the proceeds of the robbery. When charged with that possession he argued that there had been one delict, "robbery", and possession was part of it. Due to the elapsed time, the possession was not a continuation of the robbery. The robbery had somewhere along in time stopped and possession had begun ([1975] 1. S.C.R. 303).

2. A Mr. Kinney et al were convicted with hunting out of season as well as pitlamping arising from one act of hunting. This, notwithstanding, there were distinct delicts causes or matters which supported separate convictions. ([1979] 46 C.C.C. (2d) 566).

3. A Mr. Logeman was convicted of impaired driving and driving while suspended. The Kienapple principle did not apply despite the fact that there was one act of driving ([1978] 5 C.R. (3d) 219 B.C.C.A.).

4. A party by the name of Lecky was convicted of contributing to juvenile delinquency and trafficking a narcotic arising from one act of trafficking ([1978] 42 C.C.C. (2d) 406).

5. A party by the name of Earle was convicted of breach of probation and possession of a narcotic while the latter charge triggered the former. ([1980] 24 Nfld. and P.E.I.R. 65) etc.

On the other hand, where charges of impaired driving and "over 80 mlg" arise from one act of driving, the Kienapple principle does clearly apply and multiple convictions are improper.

The Supreme Court of Canada concluded therefore that the simple "one act test" is inadequate. "Two for the price of one" (my example) is not in the legal bargain basement. The Kienapple principle only applies

> "If the offences stem from the same act and have a common element or elements."

When an element is used for one conviction, then it is used up. In other words, the principle applies when the two allegations overlap in elements. The Supreme Court of Canada referred to their Kienapple decision in 1985 on this very point when, in a B.C. Case*, a man was charged with robbery and possession of a restricted weapon arising from one hold up. In that case, the Court merely said: "Of course he can be convicted of both offences." However, the Court allowed his appeal in respect to a conviction of pointing a firearm. In other words, if two charges are preferred arising from one act then the Kienapple principle applies only if there is, besides the factual nexus (the one act), also a legal nexus (the overlapping elements). In the absence of those nexus (links), dual convictions are appropriate.

The accused, in this case, had strongly relied on a decision by the Supreme Court of Canada in 1981.** In that case, the accused had deliberately set fire to his bed in a hotel. Consequently, one person died in the fire. The accused was charged with the setting of the fire and manslaughter. To prove the manslaughter, the Crown relied on s. 205 (5) (a) C.C. which states that a person commits culpable homicide when he causes the death of a human being by means of an unlawful act, in this case, the setting of the fire. That made the unlawful act (the fire) part of the homicide, hence there could not be a conviction for both offences. The one was an element of the other. The accused, in this case, argued that the Crown relied on the unlawful act of stabbing the woman who happened to be pregnant, to prove the manslaughter of the baby. The Supreme Court of Canada responded that s. 206 (2) C.C. made the homicide by stabbing a manslaughter in this case. It simply states that causing injury to a child before or after its birth as a result of which the baby dies, amounts to homicide.

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* *R. v Krug*, Volume 22, Page 2 of this publication. Recommend that case as complimentary reading to this case.

** *R. v Hagenlocker*, [1981] 65 C.C.C. (2d) 101

In 1975, when deciding the Kienapple case, the Court had said that when the principle applies and the person is convicted of the main offence, an additional conviction is "meaningless as a distinguishing feature." To consider the consequence of the stabbing (the death of the baby) "meaningless as a distinguishing feature", when Parliament has specifically provided it to be homicide in the circumstances, would be frustrating the physical safety of the public, the very objective of that provision. Furthermore, the Court held that the consequence of a wrongful act, particularly where it caused the death of a victim of violence, is a "new relevant element" capable of distinguishing two convictions in respect of a single unlawful act by an accused. In addition, if the convictions relate to different victims, the rule of multiple convictions does not apply. One pull of the trigger of a high-powered rifle may kill two or more persons with that single shot. A fire may cause multiple deaths as may a single bomb, etc.

The Kienapple principle had no application, and

The Crown's appeal was upheld
Accused submitted for trial on the manslaughter indictment

Entrapment

The Queen and COUPAL, B.C. Court of Appeal, Vancouver Registry CA 003627, November 1986*

A Mrs. Bloome was arrested in December of 1983, for possession of cocaine and stolen property. The charges were not preferred until March of 1984. After being charged, Mrs. Bloome approached her daughter's ex boyfriend, the accused, and pleaded with him to get her some cocaine to lighten her pains caused by terminal cancer. The accused was reluctant and actually refused to comply. Mrs. Bloome then went to the police and offered to deliver a cocaine dealer if they would drop the charges against her. The officers responded that if she did deliver, the best they could do was mention her cooperation to the prosecutor. They, in fact, told her that she was on her own. Mrs. Bloome then went back to work on the accused. She told him she had found someone who would supply her with cocaine but she needed someone to protect her during the transaction. She offered him $700 - to provide the protection services and to be the go-between the dealer and her. When the accused delivered the cocaine a man was with Mrs. Bloome. She had asked the accused to identify himself as a drug dealer. The man with Mrs. Bloome was a police officer and the accused was arrested for trafficking. He implied that he had complied with all Mrs. Bloome's request out of compassion for a dying woman.

At trial, defence counsel had argued that the accused had been entrapped and that the proceedings should be stayed. The trial Judge had declined to do so and convicted the accused. He appealed the conviction and, again, raised the matter of entrapment. His arguments before the Court of Appeal were strengthened by two decisions on entrapment since the accused's trial; one by the Supreme Court of Canada** and, subsequently, one by the B.C. Court of Appeal***. Entrapment was, at the time of this appeal, recognized as "an aspect of the abuse of the process of the Court" which ought to result in a judicial stay of proceedings.

The evidence, in this case, showed that the authorities meant business when they told Mrs. Bloome that she was on her own. She had devised the plot and had approached and set the accused up all on her own. Police never learned the identity of the accused until they were asked to attend to apprehend the

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* For all details, see Volume 20, page 7 of this publication.

** *R. v JEWITT*, Volume 22, page 29 of this publication

*** *R. v MACK*, Volume 22, page 29 of this publication

man who was going to sell her one-half pound of cocaine. Within 24 hours thereafter, the accused was arrested. Said the B.C. Court of Appeal:

> "There is no basis in the evidence for fixing the police with the responsibility for what Mrs. Bloome decided to do"..... "...the evidence does not show entrapment of the appellant in the sense that the prosecution of the charge would constitute an abuse of the process of the Court."

Accused's appeal was dismissed
Conviction for trafficking upheld

Comment:

The decision by the Supreme Court of Canada to recognize entrapment as an aspect of the abuse of the process of the Court (not a substantive defence) did not arise from any Charter provisions. However, it is difficult to reason that there is a difference between a private citizen acting on behalf of the Crown who infringes another persons rights or freedoms and a person initiating events amounting to entrapment resulting in evidence the Crown adduces in a prosecution.

Although this is still an unsettled issue, most Courts seem to interpret section 32 of the Charter to mean that it (the Charter) exclusively applies to the governments and its agents. That would mean that one private citizen cannot infringe the rights and freedoms of his fellow citizen. This was tested recently in Alberta when a tavern manager properly arrested, but unreasonably searched a client he believed to be under age in his establishment and found marijuana. Police were called and the young man stood trial for possession. The Crown urged that the Charter did not apply to the manager and that, therefore, there was no infringement of the right to be secure against unreasonable search and seizure. The trial Judge disagreed and so did the Alberta Court of Appeal. These Courts did not deal with the question if the Charter applies to everyone, but held that when anyone exercises a power conferred by the law, that power is derived from the "sovereign", and the act is one in obedience to the law. The arrest by the manager was, therefore, the exercise of a governmental function. In other words, whether peace officer or citizen, when we exercise a statutory power, we act on behalf of the Crown whether that power is discretionary or not. We join the Crown in its prosecutorial objective. Why should the same test not apply for the purpose of entrapment. Mrs. Bloome, though for very selfish reasons, joined the Crown when she entrapped the accused and the Crown indicated approval when it went ahead with the prosecution.

A simpler argument is that if the recent law in regard to entrapment is to disallow prosecutions of persons who were importuned or committed offences they were not predisposed to commit, then for the purpose of determining if the process of the Court is abused, what does it matter who did the entrapping?

I predict that the views of the B.C. Court of Appeal, as applied in this case, will not survive future case law.

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Police, During Search of a House, Answer the Telephone and Impersonate the Occupant. Does this Amount to Interception of a Private Communication?

Regina v CHARTRAND, County Court of Vancouver, Vancouver Registry No. C84 1915, November 1986

While searching the accused's home, the telephone rang several times. The police officers answered the calls and the callers were made to believe they were speaking to the accused. From these calls, it was obvious that the heroin found in the home was possessed by the accused for the purpose of trafficking.

One call answered by an officer went something like this:

Caller: Paul?
Const: Yeah
Caller: It's Linda. Do you know what I want?
Const: Yeah
Caller: The same stuff Joanne got the other night.
Const: Yeah
Caller: Can I come over?
Const: Yeah, can you come right away?
Caller: I'll be there in five minutes.

The Crown sought to have these calls admitted in evidence, but defence counsel objected. He submitted that the call was intended for the accused (who was only a few feet away from the phone) and that the constable had intercepted a private communication and, as a consequence, s. 178.16 C.C. applied and rendered the evidence inadmissible against the originator or the intended receiver of that communication. To show that the deception and impersonation on the part of the constable amounted to an interception, defence counsel relied on the applicable portion of the definition of "intercept" in s. 178.1 C.C.:

> "Intercept includes....to acquire a communication or acquire the substance, meaning or purport thereof."

In the mid seventies the Alberta Court of Appeal reviewed a somewhat similar case* and held that in circumstances where "Joe Doe" receives a communication that was intended for "Richard Roe", does not amount to an interception as intended by Parliament. The Court seemed to take the position that the interception the law prohibits is one of a third party interference between the originator and the intended receiver of the

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* *R. v McQueen*, 25 C.C.C. 262

communication. However, (although this is not too clear) in the Alberta case it appears that a message was left for the intended receiver of the communication. This message somehow ended up in the hands of the authorities, but did not take away from the fact that the originator intended the person who answered the phone to receive and accept the message.

Subsequent to the Alberta decision, the B.C. Supreme Court* decided a case in which the circumstances seem to match those in this Chartrand case much closer. In answer to the Crown's submission that there was no third party interference in the private communication, the B.C. Justice, obviously disagreeing with the Alberta Court of Appeal, said:

> "How are we to know that Parliament intended to sanction the interception of calls by impersonation or fraud? I think it is more in keeping with Parliament's intention to say that Parliament intended to say there must be authorization granted to intercept a call..... by someone whom the originator never intended should receive the call."

Subsequently, in a case with similar circumstances, a B.C. County Court** had to consider the admissibility of a communication between a male police officer and a caller who asked for "Shirley Tate". The officer did not change his voice or in any way disguise the fact that he was not "Shirley". He may not have volunteered to identify himself or his function, but was apparently not asked for that information as the Court concluded that there had been no impersonation or fraud. Obviously, something was said to the officer that was important to prove a criminal allegation as the Crown adduced the evidence, and the defence urged its inadmissibility on the basis of it being an unauthorized interception of a private communication. After holding that the case was distinct from the one decided by the B.C. Supreme Court, the County Court Judge said:

> "In the case at Bar, there was no deliberate impersonation. It is simply a case of a police officer who was part of the police group raiding Mrs. Tate's home answering the phone when it rang. I am of the view that the intention of the person placing the phone call was to speak to whoever answered. He presumably, because he asked for Mrs. Tate, had a further intention of getting into communication with her. It is quite conceivable that even without the police raid, the person who telephoned in would have had to have spoken to another person to get Mrs. Tate on the telephone."

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* *R v BENGERT* et al [1978] 47 C.C.C. (2nd) 457

** *R. v Carrothers* - Unreported

The County Court Judge in this Chartrand case concluded that the call intended for Paul Chartrand was recorded in that notes of it were taken; that there was no authorization to intercept and that neither the caller nor the intended receiver (the accused) consented to the officer's interference. It was also found that the officer impersonated the accused, Chartrand, and that made the case different from the County Court decision quoted above. This left the Judge to follow the binding decision by the B.C. Supreme Court and he ruled that the evidence of the telephone conversation between the impersonator, Paul (the police officer) and "Linda", the caller, inadmissible in evidence.

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Counselling to Commit Murder - Contract Killing

Regina v NEWSOM, County Court of Vancouver, No. CC86 0939
November, 1986

The accused was charged, together with a Mr. W. and Ms. D, with ultering forged documents (share certificates). While awaiting trial on those charges a Mr. Hogbin, who knew the accused, encountered him and another man discussing the forgery charges. The accused had said that he wanted one of the witnesses in the case "done in". Mr. Hogbin claims that he had interpreted this to mean that the accused wanted the witness "beaten up". However, when sometime later (on another occasion) the accused became a little more descriptive, saying that he wanted the witness "dropped in 2000 feet of water" so the body would never be found, it dawned on Mr. Hogbin that the accused wanted the witness dead. Mr. Hogbin went to the police and reported what he had learned.

Upon instructions of the police, Mr. Hogbin arranged a meeting with the accused at which he introduced an undercover police officer (equipped with a body pack transmitter) as a person who was willing to carry out the wishes of the accused for $1200. The accused, and the police officer, then removed themselves from the meeting place and completed the negotiations for the killing in the lane behind the pub (the meeting place) in the absence of Mr. Hogbin. The officer and the accused had an additional conversation four days later in which additional details were discussed.

As a consequence of those negotiations, the accused was charged in two separate counts, with counselling Mr. Hogbin and the undercover officer to commit murder.

The accused testified at his trial in support of his threefold defence: (a) innocent intent; (b) entrapment, and (e) that he did not counsel Mr. Hogbin at any time to murder anyone.

To support the defence of innocent intent the accused told the Court that he had known from the very outset that the "contract killer" was a police officer. He had wanted to embarrass the police force as they had handled his case badly. He had done no more than pulled the officer's leg in the full knowledge that the phoney counselling would never result in a murder. Furthermore, the intended murder victim would have no evidence of any consequence to give at the accused's trial for forgery. For all of these reasons, there simply was not the required <u>means rea</u> to have committed the alleged offence of counselling to commit murder.

The Court rejected the accused's evidence totally. In no way could the Judge imagine anyone pull a prank like this while awaiting a trial that could, for the accused, be so adversely affected by even a hint of wanting to eliminate a witness.

The defence of entrapment was also soundly rejected in that:

a) the offence was not in any way instigated by the police;
b) the accused was not ensnared by police in committing the offence; and
c) the police scheme was not shocking or outrageous.

The accused had simply been accommodated in carrying out his criminal intentions which he had clearly indicated (prior to any police involvement) he was predisposed to pursue.

The police involvement was proper and called for to prevent a far more serious crime than the accused was given the opportunity to commit by police.

The accused's involvement with Mr. Hogbin did not amount to counselling. The involvement with the undercover did. Hence, the accused was acquitted of one count and convicted of the other.

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LEGAL TID-BITS

Conviction on an Unexplained Single Fingerprint

A woman came home from work and found her house had been broken into. A considerable amount of valuables had been taken. A front window was found opened, but on the exterior of a rear window which showed no signs of forced entry, partial prints of one of the accused's index fingers and palms were found. He denied having broken into the house but testified that he and a friend had been in the neighbourhood on a "poppy picking expedition". He could not explain how his prints got onto the window. The trial Judge had held that there was no other reasonable explanation for the prints than the accused was the one who had broken into the house and the accused was convicted. The B.C. Court of Appeal dismissed his appeal, holding that the verdict was not unreasonable in view of the evidence.*

Is "Speeding" in British Columbia a "strict" or "absolute" liability offence?

A Mr. H. contended that if he had exceeded the speed limit, it was despite due diligence on his part. Due diligence is a defence to a strict liability offence but not to one of absolute liability. Basically, offenses are divided into three catagories in terms of intent. Mens rea (criminal intent) is a prerequisite to nearly all Criminal Code offenses and even to some regulatory provincial offenses where the language of the enactments clearly indicate this (wilfully and/or knowingly). Mens rea is subdivided into general and specific intent. Strict liability offenses are offenses against regulatory laws; mostly provincial statutes. Due diligence (having taken reasonable care to avoid or prevent the offence) is a defence to a strict liability offence. However, there are regulatory laws so essential to public safety and health that we cannot afford any defence other than doubt that the offence occurred. Those offences are known as absolute liability offences. If it is found that the offence was committed then the person the law renders liable must be convicted regardless of his reasonable care and total lack of intent. Many excuses and due diligent defenses can be imagined for speeding. However, they will likely not be to any avail in many provinces, including British Columbia. The Judge who tried Mr. H. held that speeding is an absolute liability offence.** He took his plight to the B.C. Court of Appeal which confirmed the trial Judge's ruling. Mr. H's appeal was dismissed.

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* *Regina v. Christopherson* - B.C.C.A. No. V 000193 Victoria Registry

** *Regina v. Harper*, B.C.C.A. No. V 000074 Victoria Registry, September 1986

Failing to Pull Over for Police And Careless Driving - Dual Offenses Arising from One Incident

In 1974 the Supreme Court of Canada* held that a person cannot be convicted of more than one offence arising from one delict. In that case there had been an act of sexual intercourse which resulted in an allegation of rape and sexual intercourse with a female person under the age of fourteen years. The Court held that if rape had been proven then all there was left to prove for the second offence was the age of the girl to convict for both offenses. This caused the offenses to "overlap" and the Court to rule as it did despite the fact that neither of the offenses are included in one another. Another example of such an overlap is impaired driving and "over 80 mlg.".

In the one case police chased the accused for a distance of 10 miles. She rode a motorcycle while she had been drinking, and without a licence for herself or the bike. In the other case, there was a shorter but intense chase where the accused, who had been drinking, ran into the police car to get away. The convictions sought were, in the first case, for failing to stop for police and careless driving and in the other, dangerous driving as well. The lower Courts considered that the precedent by the Supreme Court of Canada did apply and that one conviction only could result from this one incident of driving. The Ontario Court of Appeal reversed this decision and ruled unanimously that the Supreme Court of Canada decision in 1974 did not apply. These offenses were totally separate and distinct from one another with only the act of driving common to both. Dual convictions in these circumstances are appropriate held Ontario's highest Court.

Regina v. Brisson and *Regina v. Kennedy*, 27 C.C.C. (3d) 282

Note: The Kienapple case has caused considerable confusion over the last 12 years, as the judgement is vague in terms of the application of the doctrine the Supreme Court of Canada attempted to create. Furthermore, it seems the Supreme Court has somewhat mellowed or reversed its view on this issue. See *Regina v. Krug*, page 2 of Volume 22 of this publication, and *The Queen v. Prince* in this volume.

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* *Kienapple v. The Queen*, 15 C.C.C. (2d) 524

Discriminatory Sex Laws

Section 146 (1) prohibits a "male person" to have sexual intercourse with a female person who is not his wife. If such sex act amounts to assault then consent is immaterial unless the accused is less than 3 years older than the victim. Apparently, a Mr. Bearhead had sexual intercourse with a girl under the age of fourteen, which the crown alleged amounted to sexual assault as well. He wanted to raise the defence of consent but s. 246.1(2) C.C. barred him from doing so as he was more than 3 years the senior of the girl. The accused petitioned the Alberta Queen's Bench to have the sections 146 (1) C.C. and 246.1(2) C.C. declared without force or effect as they are discriminatory and consequently inconsistent with s.15 of the Charter. After all, the one discriminates in regards to gender and the other in respect to age. A female person can with impunity have sexual intercourse with a male person under the age of fourteen argued the accused and what has age got to do with consent?

The Court conceded that the sections are discriminatory and inconsistent with the Charter. However, girls get pregnant and boys don't; girls are in need of a greater protection because of things nature and not law has created. Furthermore, the consent provision made eminent sense as the age tends to make the boy and girl peers and the girl less vulnerable to more sophisticated allures of older men. Subjecting the discriminatory sections to the validity test contained in s.1 of the Charter the Court concluded that the provisions are demonstrably justified in a fair and democratic society.

Application denied

Regina v Bearhead, 27 C.C.C. (3d) 546

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Seized Property - The Owner - The Charter

The relatively new sections of the Criminal Code require police to submit a report to a Justice if it is considered that seized property must continue to be detained for the purpose of investigation or legal process. If no

proceedings have commenced within 90 days of the seizure of the goods the Crown must show justification for continued retention of the goods.*

In this case, the Crown gave notice to the Justice that it wanted to show cause for detention of goods beyond 90 days. The owner of the goods had not been notified of the hearing and the Court refused to proceed with it. The Judge, in essence, reasoned that the retention of seized property offended 87784477he Charter which grants the right to be secure against unreasonable search and seizure. He appeared to be of the opinion that a hearing under s. 446(2) C.C. is an exercise to test the limitation of that right (the continued detention of seized property) as well as its justification (see s.1 of the Charter). The Crown had taken the position that nowhere in the relevant sections is there an obligation to notify the owner of the property (the retention of which is required beyond the 90 day limit) and petitioned the Newfoundland Supreme Court to order the Justice (probably the Provincial Court) to get on with the hearing. The Supreme Court Justice agreed with the Crown that the owner needs not to be notified as he is sufficiently protected under the criminal code provisions. He can initiate applications on his own and had adequate access to the Court should he wish to dispute the justification for the retention of his property. Furthermore, the Court held that s. 8 of the Charter had no application at all as "seizure" and "detention" in relation to property, are quite distinct from one another. The Charter deals with seizure only. Section 446 C.C. provides for disputes or continuation of detention of such property. Application was granted and the order the Crown sought for continuation of the hearing was issued.

re: *Barnable P.C.J. and The Queen*, 27 C.C.C. (3d) 565

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* Sections 445.1 - 446 of the Criminal Code